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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Review of the Commission's	)	
Regulations Governing Program	)	MM Docket No. 95-92
Practices of Broadcast Television	)	
Networks and Affiliates	)	
	)	
47 C.F.R. §§73.658(a), (b), (d), (e) and (g)	)	

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COMMENTS OF

THE WARNER BROS. TELEVISION NETWORK

THE WB TELEVISION NETWORK

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SUMMARY

The network/affiliate rules, by removing barriers to entry, were designed to stimulate the creation of new television networks. The Warner Bros. Television Network ("The WB") submits these Comments as a newly minted, still fragile network. The WB has been on the air less than one year, and has a long, treacherous path to travel before earning a profit. Launching this new network is a daunting challenge. An emerging network must be nurtured if it is to survive, let alone flourish. Simply stated, now is the worst of times to eliminate the network/affiliates rules that continue to prevent the erection of barriers to network entry. If the Commission eliminates those rules at this fragile juncture in The WB's development, The WB might very well not survive.

The Commission, in its NPRM, appropriately asks interested parties to assess whether the network/affiliate rules continue to be effective or whether they are no longer needed to achieve their intended goal. Using this as our framework for analysis, The WB urges the Commission to retain the exclusive affiliation and time option rules, both of which remain critical to a newly emerging network like The WB. Elimination of these rules would unwittingly heighten the already formidable hurdles that The WB faces as a new network. By contrast, the Commission's proposed modifications to the right to reject and network territorial exclusivity rules would not impede the entry of and, indeed, could help new networks. The WB therefore supports the proposed changes to those rules. We address each of these rules in turn.

First, The WB strenuously opposes the Commission's proposal to eliminate the rule prohibiting exclusive affiliations. A new network can have the best programs in the

best line-up, but without enough affiliates to broadcast those programs across the country, a national network can neither survive nor thrive. Finding stations with which it can affiliate has been the most frustrating task for The WB in building its new network, because the supply of available stations is so severely limited. Because the exclusive affiliation rule prevents existing networks from including exclusivity provisions in their affiliation agreements, the rule increases the available outlets for network programming through the use of secondary affiliations. When there has been no viable alternative in a market, The WB has turned to secondary affiliations. While a choice of last resort, secondary affiliations are, by necessity, an essential building block of this new network. If the Commission eliminates the exclusive affiliation rule, it will permit the incumbent network to insist on exclusive affiliations, thereby knocking the newest entrant out of the competition.

Second, The WB opposes the Commission's proposal to eliminate the time option rule. Like the exclusive affiliation rule, the time option rule also increases the available outlets for new network programming. By preventing other networks from optioning the unused parts of a station's broadcast day without committing to actually use that air time, the time option rule preserves the opportunity for a new network to enter into secondary affiliations. Indeed, an incumbent network could -- and would, absent the rule -- achieve *de facto* exclusive affiliations through the use of time optioning. As with the exclusive affiliation rule, therefore, elimination of the time option rule will only exacerbate the problems arising from an already severely limited supply of stations with which a new network can affiliate.

Third, The WB supports the Commission's proposal to modify the right to reject rule as proposed, so that affiliates cannot reject programs solely based on financial considerations. The proposed modification strikes an appropriate balance between a licensee's control over programming and a new network's need for a degree of predictability with respect to clearances if it is going to invest the millions of dollars that it takes to launch a new network.

Finally, the Commission should modify the network territorial exclusivity rule as proposed so that a network can grant exclusivity within a DMA. The WB also does not object to the Commission's proposal to repeal the first prong of the network territorial exclusivity rule, which prohibits a station from preventing a network from making available to another station in the market programs preempted by the affiliate. While The WB agrees that the network (not the affiliate) should have the discretion to decide whether it will make preempted programs available to another station in the market, The WB is willing to negotiate for this right.

The established networks will no doubt ask to be freed of all restrictions. They are, in this respect, not unlike the residents of an exclusive island. It is only the established residents who favor tearing down the bridge and replacing it with slow ferry boats to discourage new entrants. The Commission has historically been strong in adhering to its policy to favor all new network entrants. It should, therefore, leave intact all bridges to entry.

With two budding networks fighting desperately for survival, it would be a grave error for the Commission to eliminate those rules that ensure that no unnecessary barriers are erected against entry by new networks. In short, today's new networks deserve the same chance that their predecessors were given to compete in a market absent barriers imposed by the incumbent networks.

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COMMENTS OF THE WARNER BROS. TELEVISION NETWORK

Pursuant to the Notice of Proposed Rulemaking ("NPRM") released by the Commission on June 15, 1995 in the above-captioned proceeding, The Warner Bros. Television Network ("The WB") hereby submits these Comments.

INTRODUCTION AND FACTUAL BACKGROUND

The WB submits these Comments as a newly minted, still fragile television network. On June 8, 1948, the era of television as a form of modern mass entertainment was launched with Milton Berle's *Texaco Star Theatre*. Forty-seven years later, at 8 p.m. on January 11, 1995, with a flick of the switch by Michigan J. Frog, The WB was launched.

The WB entered the network business in January with two hours of prime time network programming per week, carried by 48 affiliated stations nationwide with an audience reach of 80 percent.[1] This fall, The WB added a second night of prime time programming with three hours on Sunday. The WB also launched *Kids' WB*, which consists of a block of children's programs on Saturday mornings as well as a weekday morning children's program. The WB now broadcasts 13 hours per week to 82 affiliates (of which 13 are secondary affiliates), for a nationwide reach of 83 percent including the superstation WGN (64 percent without WGN's cable reach).

The Commission's reevaluation of the network/affiliate rules comes at a unique time in broadcasting history when not one, but two, new networks are attempting to gain a foothold in the over-the-air television market. The birth of a television network is a rare occurrence in the American experience. Since Philo Farnsworth's first experiments in his Green Street lab,[2] only seven nationwide broadcast networks have been launched.[3] The two newest network entrants -- The WB and UPN -- must compete with four powerful, established networks (and with each other). While the mass media landscape has unquestionably changed since the Chain Broadcasting rules were adopted in 1941 and

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[1] This audience reach was achieved by the fact that The WB is carried on the superstation WGN, which adds additional cable carriage. The WB's over-the-air reach (without WGN's cable carriage) was 61 percent at launch.

[2] Philo Taylor Farnsworth (1906-1971) was an American television engineer and inventor who devised an image dissection tube in 1928 that represented a great advance in the evolution of television.

[3] The seven were ABC, CBS, NBC, Dumont, Fox, The WB and UPN. We refer here to full service, general entertainment networks and therefore exclude religious networks and special purpose networks such as home shopping.

then applied to the television industry in 1946, a primary goal of the rules -- to "remove barriers that would inhibit the development of new networks" -- stands no less important today.[4]

In fact, the challenge of launching a new network is even more daunting today, in light of the paucity of unaffiliated television stations in many markets and the vast number of choices (including the four incumbent networks) that vie for viewers' attention. Simply stated, this is not the time to remove the safeguards the Commission provided to the earlier network entrants. Today's new networks -- The WB and UPN -- deserve the same chance that the other most recent beneficiaries of the rules (ABC and Fox) were given to compete in a market absent barriers imposed by the incumbent networks.

With two budding networks fighting desperately for survival, it would be a grave error for the Commission to eliminate now those rules that ensure that no unnecessary barriers are erected against entry by new networks. The enormity of launching a new network -- both financial and otherwise -- cannot be understated. It has been widely reported that an initial investment of approximately $300 million was necessary for the

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[4] NPRM at ¶ 6. In 1941, there were four national radio networks (two NBC networks, the "Red" and the "Blue," the CBS network, and the Mutual Broadcasting System's radio network). The Mutual radio network lagged far behind the others. Although each of the networks had a roughly comparable number of affiliated stations, the stations affiliated with Mutual were for the most part less desirable in terms of frequency, power and coverage. The Commission concluded that the dominant networks severely limited the ability of Mutual to compete in and new networks to enter the marketplace. The historical parallel today is undeniable. *See Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, at 30, 48 (May 1941).

launch of The WB and that first year losses for the network could be in the $50-$75 million range.[5] The WB is not expected to break even for four years.[6]

Perhaps the single most difficult impediment for The WB has been finding enough television stations with which it can affiliate to gain the requisite national reach.[7] Not only has The WB experienced difficulty finding enough affiliates in the quantitative sense, it has also had difficulty finding sufficiently powerful stations with which to affiliate to gain market wide and, subsequently, nationwide reach. Unlike the established networks with their extensive distribution systems composed of powerful VHF stations, The WB network has relatively few VHF station affiliates, and is by necessity primarily composed of weaker UHF stations. In addition, in some markets, The WB has been forced to rely on low power stations or the local cable system's carriage of WGN.[8] In other markets, The WB has had to enter into secondary affiliations with stations that have a primary affiliation with another network. In a very limited number of markets, the primary affiliation is with one of the established networks such as NBC or Fox. In most cases, the primary affiliation is with the other incipient network, UPN. As explained more fully below, *in no case would The WB enter into a secondary affiliation agreement if it had the option of affiliating with another viable station that covers the market.*

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[5] David Tobenkin, *New Players Get Ready to Roll: UPN and WB Prepare to Take Their Shots*, Broadcasting & Cable, Jan. 2, 1995, at 30.

[6] *Id.*

[7] The WB's national advertisers require coverage of *at least 80 percent* of the country.

[8] The problem of finding available, viable and willing stations with which to affiliate is not limited to smaller markets. For example, in Baltimore, Maryland (the 23rd largest market), The WB had to affiliate with a low power television station.

Finding stations with which it can affiliate has been the most frustrating task for The WB because it has so little ability to affect the outcome. The other challenges of starting a new network -- *e.g.*, deciding what kind of "look" the network will have, choosing the programming and then purchasing or producing it, and scheduling the programs -- are all decisions over which The WB can exercise control. But The WB cannot control (or increase) the number of available over-the-air television stations allocated to a particular market. Nor can The WB change the fact that it is, at best, the fifth or in some markets the sixth entrant. The immutable fact is that almost two thirds of all television markets have only four commercial TV stations. And fewer than 20 percent of all markets have six or more commercial stations. Even then, the stations are not necessarily available. In addition to affiliating with ABC, CBS, NBC and Fox, incumbent stations in a market frequently have already affiliated with a home shopping or religious network, thus making them unavailable to new network entrants.

Even when there is a station available for affiliation, these stations tend to be the weakest stations in the market. And often, even if an available station is located in a particular DMA, the station is so far removed that it may not have sufficient reach to cover the center of the population. The established networks have understandably sought affiliations with the stations with the strongest ratings and coverage areas. Thus, of The WB's 69 primary affiliations, 57 of the affiliates are channel 14 or higher; 51 are channel 21 or higher; and 21 are channel 41 or higher.

The weaker coverage of The WB's affiliates and the correspondingly lower ratings translate directly into lower revenues. As the Commission is well aware, a network's revenues are generated directly from the advertising dollars it earns. The lower the ratings, the lower the advertising rates. The WB's ratings are far lower than the established networks. While The WB prime time network programs average a 2.3 rating,[9] the prime time ratings of ABC, CBS and NBC average 10.0 to 11.7, more than four times that of The WB.[10] Consequently, although The WB pays established network prices for its programs as it tries to gain a competitive foothold, its revenues lag far behind those of the established networks. The average rating of The WB's affiliates during *non*-network broadcasts is lower still. As a result, promotions for The WB's network programs during those other broadcast hours are viewed by few viewers.

The rule changes that The WB opposes are those that would increase The WB's difficulties in finding stations with which it can affiliate. Specifically, the exclusive affiliation and time option rules should not be changed at this time because the elimination of those rules would only exacerbate the problems arising from an already severely limited supply of stations with which a new network can affiliate. While there are some markets where The WB may be sufficiently "established" in a primary affiliation to benefit from elimination of those rules, the results could be disastrous in less established markets. On balance, therefore, the public's interest in promoting diversity is furthered by retention of the rules.

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[9] These ratings were for the week of October 2, 1995. Hollywood Reporter, Oct. 11, 1995, at 22-23. Low ratings are not unusual for a new network. UPN's rating for the same period was 2.9. *Id.* Fox averaged a Nielsen rating of 3.7 for its Sunday line-up in its earlier days. Wayne Walley, *Fox Hot Upfront Despite Ratings*, Advertising Age, July 20, 1987, at 3.

[10] Hollywood Reporter, October 11, 1995, at 22-23.

I. THE WB OPPOSES ELIMINATION OF THE EXCLUSIVE AFFILIATION RULE

The exclusive affiliation rule preserves an affiliate's ability to enter into secondary affiliations by prohibiting arrangements between a station and a network that prevent or hinder the station from broadcasting the programming of another network.[11] The exclusive affiliation rule has thus permitted stations to enter into dual affiliations. The Commission proposes to eliminate the prohibition on exclusive affiliation. Because elimination of the rule would severely impede, if not totally eliminate, the availability of secondary affiliations (even in large markets), The WB strenuously opposes the Commission's proposal to eliminate the exclusive affiliation rule.

As explained above, The WB has had to rely on secondary affiliations to gain entry to some markets. The WB currently has 13 secondary affiliations. Secondary affiliations, while not a new network's first choice, are an essential building block for The WB. Even in large markets such as Cleveland, Ohio (the 13th largest market), which has eight commercial stations, and West Palm Beach, Florida (the 45th largest market) with six commercial stations,[12] The WB has had to enter into secondary affiliations to gain entry to the market.

The Commission has asked whether new networks enter into secondary affiliations even if there are available stations in a market.[13] The WB's response is a resounding "no." The WB has never turned down a primary affiliation when one was

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[11] 47 C.F.R. § 73.658(a).

[12] Television & Cable Factbook Volume 63, at A-1 (1995).

[13] NPRM at ¶ 35.

available with a viable, full power station or even with a station that had a strong potential for becoming viable. Secondary affiliations are The WB's choice of last resort because the hallmark of a network is the ability to run its programming "in pattern," that is, in the order determined by the network and simultaneously (within a time zone) by all TV stations. With a secondary affiliate, the second network's programming is only aired when the affiliate has available air time, *i.e.*, when the affiliate is not broadcasting the programming of its primary affiliate.[14] Without the ability to have its programming run in pattern, a network loses a primary defining characteristic. The WB would therefore never choose a secondary affiliation over a primary affiliation, even if the primary station were stronger, so long as the weaker station was a full power, viable station.

To maximize the potential for running its programming in pattern, the majority of The WB's secondary affiliations are with UPN affiliates. Because UPN, as another new network, only provides a network feed for a portion of the broadcast day and for a limited number of days during the week, a UPN primary affiliate has sufficient "shelf space" to air the programming of both networks, without having to run the programs of either network in the middle of the night.[15]

Although secondary affiliations are the choice of last resort for The WB, they nonetheless remain a necessity for an emerging network. Elimination of the exclusive affiliation rule would make secondary affiliations highly improbable if not nonexistent as a

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[14] NPRM at ¶ 35, n.33; *see, e.g.* Cheyenne, Wyoming example, *infra*, note 15.

[15] In Cheyene, Wyoming, by contrast, The WB has a secondary affiliation with KKTU-TV, an NBC affiliate. The WB prime time "line-up" is aired between midnight and 1:00 a.m. each weekday, while *Kid's WB* airs at 5:00 a.m. on weekday mornings, Saturday morning from 7:00 to 8:00 a.m. and Sunday from 5:00 to 7:00 a.m.

practical matter, even if they remain possible in theory. Certainly, the Fox dual affiliations will disappear in an instant if the rule is repealed. Even with the rule in place, Fox affiliates have received incredible pressure from the network not to accept secondary affiliations.[16] There is no question, therefore, that these affiliates would be required to agree to exclusivity if they want to keep their Fox affiliation.[17]

Indeed, elimination of the exclusive affiliation rule could limit the entry of new networks even when the primary affiliation is with another new network. As the Commission is well aware, The WB and UPN are competing head-to-head as the two most recent network entrants. Many industry analysts predict, in fact, that only one of the two will survive.[18]

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[16] In October 1994, after 17 Fox affiliates decided to sign secondary affiliations with UPN, Fox Broadcasting Distribution President Preston Padden sent a memorandum to all general managers and owners of Fox affiliates cautioning them against signing secondary affiliations with a new network. Mr. Padden stated:

> Our plans are on an absolute and irreconcilable collision course with the notion of secondary affiliations. We can't imagine that any Fox affiliate wants to risk a conflict with major weekend sporting events from Fox by committing time periods to 'Fifth Network' entertainment series. . . .
>
> Both Paramount and Warner Brothers will attempt to copy our success in building a distinctive brand name franchise. If you try to ride 2 horses, you are inviting viewer . . . confusion and dilution of your distinctive identity . . . .

Communications Daily, Oct. 18, 1994, at 6. Mr. Padden also "warned" affiliates against substituting programs from the secondary network for locally produced news programs or forthcoming Fox national news programming. *Id.*; *see also* David Tobenkin, *Padden Warns Against Secondary Affiliation*, Broadcasting & Cable, Oct. 17, 1994, at 14.

[17] Fox affiliates currently average a 7.2 rating during the Fox prime time feed, considerably higher than the 2.3 that The WB affiliates average or the 2.7 that UPN affiliates average. Hollywood Reporter, Oct. 11, 1995, at 22-23. It is unlikely, therefore, that the Fox affiliates would risk losing their Fox affiliation to keep their secondary affiliation with The WB or UPN.

[18] In a January 1995 Broadcasting & Cable survey, only 22 percent of television station general managers surveyed thought that there was room for two new networks in today's television marketplace. *TV Survey: If Only One, It's UPN*, Broadcasting & Cable, Jan. 16, 1995, at 3. *See also*

Whichever new network is first to sign up an affiliate in a market, therefore, has the incentive to keep that station from signing a secondary affiliation with the competitor network. To the extent there are no other viable, available stations in the market, the other new network is left out in the cold. Obviously, if this happens in too many markets the newest network will not survive -- to the delight of the competing network but to the detriment of the viewing public.

The WB has already experienced the muscle that incumbent networks are not shy to flex -- even when the incumbent is the other new network that got there first. UPN, for example, requires all of its affiliates to enter into affiliation agreements with a standard provision that requires the affiliates to identify themselves *exclusively* as part of the UPN network.[19] While this provision does not prohibit the stations from airing the programs of another network -- a provision that would unquestionably violate the FCC's exclusive affiliation rule -- the current provision nevertheless "hinder[s]" stations' ability to broadcast the programs of secondary networks by preventing stations from promoting those programs so that viewers will watch.[20] It, too, is therefore in violation of Section 73.658(a).

Steve Coe, *Seven Network Players: All Together*, Broadcasting & Cable, Jan. 30, 1995, at 11; Steve Coe, *WB/UPN Talk, No Action*, Broadcasting & Cable, Sept. 25, 1995, at 32.

[19] Specifically, UPN network affiliation agreements contain the following provision:

> Station Identification. Beginning September 1, 1994 and continuing throughout the License Term, Station shall identify itself *exclusively* as part of the "Paramount Television Network" or such name as Paramount may subsequently designate in writing, in all Station I.D.'s telecast, and in all other promotional materials distributed; provided however that such identification may be preceded by Station's call letters, community of license and channel position. (Emphasis added.)

[20] The WB has typically entered into secondary affiliations with stations that already had UPN as their primary network. Because these stations had already signed the UPN affiliation agreement (with the offending exclusively provision), The WB had little choice but to affiliate with these stations on a secondary basis and later face UPN's blatant attempts to impose exclusivity with respect to network identification and promotion on these dual affiliates.

Notwithstanding the illegality of this contract provision, The WB is aware of at least two incidents in which UPN has attempted to strong-arm and force stations to comply with the provision. In the first incident, UPN sent two "URGENT" facsimiles to all of its affiliates instructing them to "cover" a WB/Kool-Aid Bursts spot that was being aired during syndicated programming on UPN.[21] The UPN fax then urged the affiliates to cover the spot with UPN kids promotional material.[22] The WB only discovered this incident after it was contacted by some of its affiliates with dual affiliations with UPN. This strong-arm tactic apparently worked, because many affiliates covered the spot. The WB was ultimately forced to withdraw the spot or risk losing the national advertising revenue due to the underdelivery of U.S. household coverage.

In the second incident, UPN contacted at least some of its affiliates with secondary affiliations with The WB and instructed them that pursuant to the Station Identification provision in their affiliation contracts,[23] they could not even display The WB's "bug" (*i.e.*, The WB logo) during The WB programming that they aired.[24] UPN further instructed its affiliates that they could not air any other promotional indicia

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[21] *See* Facsimile from UPN Network Distribution to All GM's, PDs and GSMs 1 (August 9, 1995). A copy of that fax is attached to these Comments at Exhibit A. The copy for the covered spot read: "This fall the Animaniacs are leaving their old network behind to join a new network for kids. It's WB. To celebrate, get one collector milk cap free inside specially marked packages of Kool Aid Bursts. So make the switch to your WB station."

[22] *Id.*

[23] *See supra* note 19.

[24] The WB "bug" is a small logo (similar to the one that appears on the cover of these Comments) that is often inserted in lower right hand corner of the television screen during the first few minutes of a WB program.

of The WB. UPN's Senior Vice President of Business and Legal Affairs wrote to one dual UPN/WB affiliate that:

> . . . Paragraph 7(B) of [Station's] Affiliation Agreement with UPN requires [Station] to identify itself exclusively as a UPN affiliate and prohibits [Station] from telecasting any material which portrays or identifies [Station] as part of any network other than UPN. *As such, [Station] may not air any "bug," logo, mascot, trademark, or any other material which identifies [Station] as being associated with "The WB" network.*[25]

Such conduct severely hampers the second network -- here, The WB. Network program promotion and identification is the life blood of the network/affiliate relationship. If an affiliate is prohibited by its primary network from promoting and identifying the programs of its secondary network, the secondary network affiliation is virtually worthless because there is no way for viewers to be attracted to the second network's programs.

In light of UPN's conduct to date (even with the exclusive affiliation prohibition in place), it is evident that if networks are given carte blanche to enter into exclusive affiliation agreements, The WB's major competitor, UPN, would likely include an exclusivity requirement as a "standard" provision in its affiliation agreements, thereby impeding the development of The WB as it endeavors to attract additional affiliates. UPN, of course, is no different in this regard from other incumbent networks. As noted above, Fox has also already expressed its strong disapproval of any secondary affiliations by its affiliates. Indeed, it has done so even while it has relied on some secondary

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[25] Letter from Valerie A. Cavanaugh, Senior Vice President, Business and Legal Affairs, UPN 1 (August 4, 1995) to a WB affiliate (emphasis added).

affiliations itself. Those secondary affiliates, in turn, have met with resistance from the other incumbent networks.[26] In general, the competition among the broadcast networks for affiliates has all the charm of an alley fight. The inescapable conclusion is that absent the prohibition against exclusive affiliations, the primary network will insist on such a provision in its affiliation agreements.

To be sure, in those markets in which The WB is the incumbent, it might like the ability to prevent its competitors -- including UPN -- from gaining a foothold in the market via a secondary affiliation. The costs to competition and diversity for the viewer, however, outweigh any benefits to The WB. Without the rule in place, the incumbent network will simply require exclusive affiliations, thereby knocking the newest entrant off the starting line before the race even begins. To prevent this result, the Commission should retain the exclusive affiliation rule.

II. THE WB OPPOSES REPEAL OF THE TIME OPTION RULE

The WB opposes elimination of the time option rule, which prohibits arrangements between a station and a network in which the network retains an "option" on the station's time -- *i.e.*, the network reserves the right to start a network feed at some unspecified time in the future without ever agreeing that it will use the time.[27] Absent the rule, a network could option all of its affiliates' time. The Commission proposes to modify the rule to allow time optioning, subject to a predefined notification period within

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[26] *Fox Wooing Affiliates of ABC, NBC and CBS*, Broadcasting, June 6, 1988, at 36.

[27] 47 C.F.R. § 73.658(d).

which a network must decide whether to exercise its option.[28] The WB opposes the proposed modification because elimination of the underlying time option prohibition could hinder, if not eliminate, a station's ability to enter into secondary affiliations.

In the NPRM, the Commission appropriately recognizes that the time option rule was adopted to foster the development of new networks.[29] Now, however, the Commission asks whether elimination of the time option rule could actually help new networks that want to reserve time blocks without committing to use the time.[30] The answer is that while time optioning may help the new network that gains a primary affiliate in the market, that is only because that new network has become an "incumbent" vis-a-vis other would-be network entrants. Time optioning harms the new network that does not have a primary affiliate by erecting an enormous -- perhaps insurmountable -- hurdle for the newcomer whose only entry into a particular community is through a secondary affiliation.

Simply stated, if networks are permitted to include time options as standard fare in their affiliation agreements with their primary affiliates, they will be able to achieve *de facto* exclusive affiliations. For all the reasons explained above, exclusive affiliations will become the norm and the last network trying to get in the door will be shut out without even the chance to compete for viewers. In light of UPN's recent attempts to achieve exclusive affiliations via its prohibition against promotions or identifications of

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[28] NPRM at ¶ 32.

[29] *Id.* at ¶ 30.

[30] *Id.*

secondary affiliations, little imagination is necessary to know that time optioning would be used to achieve the same end -- exclusive affiliations -- if the time option prohibition is eliminated.

Even if the Commission were to impose some time limit on a notification requirement, the deleterious effect on emerging networks would remain. Even with a notice period (of any length), the primary network would still have the ability *now* to option any or all of a station's broadcast day, thereby effectively precluding secondary affiliations. The fate of The WB depends on its ability to gain a nationwide reach *now*, not when any option terms expire. By then, it may be too late.

Accordingly, because time optioning could -- and would -- be used offensively by incumbent networks to thwart diversity and require exclusive affiliations, elimination of this rule is not in the public interest and should not be permitted, even for incipient networks.

III. THE WB SUPPORTS THE PROPOSED MODIFICATION TO THE RIGHT TO REJECT RULE

The WB supports the Commission's proposed modification to the right to reject rule. Unlike the rules discussed above, modification of this rule will not impede new network entry. To the contrary, the proposed modification should actually help new networks.

The right to reject rule prohibits a station from entering into a contract with a network that does not permit the station to (1) reject network programs that the station "reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest," or (2) substitute a program that the station believes to be of greater local or national importance.[31] The Commission proposes to retain the rule, but to clarify that the rule may not be invoked based solely on financial considerations.[32]

The WB acknowledges a licensee's non-delegable duty to retain sufficient control over its programming choices to ensure that it meets its obligation to operate in the public interest. The Commission's rule thus ensures that stations retain the ability to preempt network programming if other programming is of greater importance to the community (such as fast-breaking new stories). Although networks, especially incipient networks, are harmed when stations reject networking programming, program rejection based on *bona fide* reasons counterbalances that harm with a benefit to the public interest.

By contrast, to the extent that stations preempt network programming in favor of other programming simply because the alternative may be more profitable, there is no tangible benefit to the public. There is, however, an unmistakable economic detriment to the network, particularly an incipient network that is attempting to create and maintain a loyal audience while it recoups substantial startup costs.

As explained above, The WB must rely on its advertising revenues during the broadcast of its network programs to recoup its enormous startup costs. When a station preempts a regularly scheduled network program and replaces it with another program, The WB loses those revenues. Even if the station reschedules the preempted program, previously loyal viewers may lose patience in trying to find the program and stop

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[31] 47 C.F.R. § 73.658(e).

[32] NPRM at ¶ 25.

watching altogether. And new viewers will not know when the program is to be aired and thus will be deterred from becoming regular viewers of the program.[33] This, in turn, will result in lower ratings and correspondingly lower advertising rates and revenues making it financially impossible to produce network-quality programming.

Program preemption also hampers a network's ability to run its programs in pattern. As discussed earlier, the ability to run programs in pattern is the hallmark of a network and, perhaps even more importantly for an emerging network, is a major factor in determining what advertisers are willing to pay for advertising time. If The WB cannot offer its advertisers a level of certainty with respect to whether programs will be run in pattern, the result will only be a further depression of advertising rates. Nascent networks are particularly sensitive to any decrease in advertising rates because they must pay established network prices for network-quality programming, even while their advertising rates (and resulting advertising revenues) are a fraction of those of the established networks.

Although larger, established networks may be able economically to withstand some negative impact upon their ratings due to program preemption, the disparate ratings of established and nascent networks reveal that new networks can ill afford any depression of their ratings or advertising rates.[34] It is thus particularly important to The WB, as a new network, that it be able to negotiate to secure a firm commitment from its affiliates to air The WB's programming even if, as one would suspect, that new

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[33] This problem is exacerbated in the case of new networks with an entirely new slate of programs, limited air time, an unpredictable viewer base, and weaker stations.

[34] *See supra* at note 9.

programming does not always appear to be the most profitable programming available at this time. If stations are afforded an unfettered right to reject network programming for their financial purposes (the right to "cherry pick"), The WB will be denied the very certainty that is necessary for it to invest the amount of money that will give it a chance to succeed and become a viable competitor in the television marketplace. For these reasons, The WB urges the Commission to modify its right to reject rule to clarify that the network can obtain an agreement that the affiliate will not reject network programming for purely financial reasons.

IV. THE WB SUPPORTS THE PROPOSED MODIFICATION TO THE NETWORK TERRITORIAL EXCLUSIVITY RULE

The WB supports the Commission's proposed changes to the network territorial exclusivity rule. The network territorial exclusivity rule prohibits a station from entering into an agreement with a network that prevents: (1) another station located in the same community from broadcasting those network programs not taken by the network affiliate; and (2) another station located in a different community of license from broadcasting any of the network's programs.[35] As the Commission noted in the NPRM, unlike the other rules under consideration, the network territorial exclusivity rule addresses curbs on station power rather than network power.[36] Specifically, the network territorial exclusivity rule serves to prevent one station from blocking another station's access to network programming. The Commission proposes to eliminate the first prong of the rule

[35] 47 C.F.R. § 73.658(b). The rule allows a network affiliate to have the "first call" on network programming within its community of license.

[36] NPRM at ¶ 46.

and retain the second prong, but asks whether the latter should apply to a broader area than an affiliate's community of license, such as a licensee's DMA or Grade B contour.

The WB supports the proposed modification and concurs that the first prong of the network territorial exclusivity rule can be eliminated with little, if any, impact on the television marketplace. Typically, affiliation agreements give a licensee "first call" on a network program. It is not clear that this will change if the first prong of the rule is eliminated. Ultimately, it should be left to the network to decide whether, if an affiliate preempts network programming, the network wants to make that programming available to another station in the market. Even as a brand new network -- with the least amount of leverage against its affiliates -- The WB is comfortable negotiating for this right without a government regulation requiring that it have such a right. Because The WB's approach in this proceeding is only to seek retention of those rules that we believe are critical to The WB's survival, we do not ask the Commission to retain this restriction.[37]

With respect to the Commission's question as to whether the area of permissible exclusivity should be some area other than the community of license, *e.g.*, the DMA or Grade B contour, The WB suggests that the Commission may want to consider using a DMA standard. A station's community of license in some cases bears no resemblance to the market in which the station competes. For example, WOR-TV may be licensed in Secaucus, NJ, but it competes in the New York City market. At the same time, a station's Grade B contour may, in many cases, extend beyond the boundaries of the "market." The

[37] Indeed, elimination could benefit the network. Some have (in our view, incorrectly) interpreted this prong of the rule to *require* a network to sell a preempted program to another station in the market. Elimination of this part of the rule will make clear that the decision rests where it should be -- with the network.